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Subject: Inside EPA: Groups Take Dual Tracks To Force EPA To Strengthen State Water Standards

Groups Take Dual Tracks To Force EPA To Strengthen State Water Standards

Posted: November 5, 2013

Environmentalists are pursuing both administrative and litigation options to force EPA to raise Washington state's assumed fish consumption rates when setting water quality standards, efforts that highlight the uncertainty advocates face as the agency moves to raise the bar for when it finds state water quality limits are deficient and require preemption.

Northwest Environmental Advocates (NWEA) [Oct. 28 petitioned EPA](#) to find Washington state's water quality standards for toxics are inadequate to protect human health and to step in with federal standards that assume higher fish consumption rates.

The petition follows an Oct. 11 suit filed by Earthjustice on behalf of six local groups that argues that a series of letters EPA sent to Washington officials shows the agency has already found the state's rules to be inadequate and that the agency faces a mandatory duty to step in and revise them.

Environmentalists' dual approaches come as EPA is seeking to raise the bar on when it has made a formal "determination" that a state's water quality standard is inadequate, a finding that triggers a Clean Water Act (CWA) provision that requires the agency to promulgate new standards.

The agency's recently proposed rule revising how it reviews and sets water quality standards includes specific conditions for when EPA is deemed to have made such a determination. Specifically, the proposal says such a finding "must be signed by the Administrator or his or her duly authorized delegate, and must include a statement that the document is a determination for purposes of section 303(c)(4)(B) of the Act."

That change would set a higher standard for environmentalists who succeeded in forcing the agency to craft controversial numeric nutrient criteria for Florida in a 2009 lawsuit that succeeded in part due to uncertainty over how the current regulations define when the agency makes such a "determination."

EPA has also resisted environmentalists' efforts to issue a formal determination on their 2008 petition seeking strict nutrient standards for Mississippi River Basin states, initially issuing only an informal denial. But a federal court in Louisiana recently ruled in *Gulf Restoration Network v. EPA* to require the agency to issue a formal decision, though the court allowed EPA the right to deny the petition on economic grounds.

Sources tracking the Gulf litigation said before the court's ruling that if EPA completes the water quality standards rulemaking before the suit is resolved it could undercut the litigation.

In the case of Washington's water toxics standards, environmentalists appear to be taking no chances on whether EPA has or has not made a formal determination.

In its petition, NWEA acknowledges that the suit -- filed in federal district court in Seattle -- claims EPA has already made the determination: "Either, as that lawsuit alleges, EPA has already made such a determination and now has a mandatory duty to promulgate new criteria for Washington, or pursuant to this petition, EPA must make a determination."

Hypoxic 'Deadzone'

An NWEA source says the petition is similar to one filed in 2008 by the Gulf Restoration Network asking EPA to force Mississippi River Basin states to adopt stricter nutrient criteria to address the Gulf of Mexico's hypoxic "dead zone."

Additionally, the source says the CWA has stronger requirements for updating toxics limits compared to nutrients, giving EPA "thinner ground" to avoid the issue.

The petition allows environmentalists to continue to press EPA for tougher limits if the agency successfully argues in the Earthjustice lawsuit it has not made a "determination" about Washington's standards. "You can't, right off the top, sue the administration for not making a determination," the source says. "You can ask them to make it and you can sue them if they choose not to."

The NWEA petition comes in response to the Washington Department of Ecology's effort to revise its water quality criteria to protect human health by updating its fish intake rate, along with several other factors.

But the NWEA source is not confident the state's comprehensive overhaul of the toxics standards will be finished anytime soon. "I suppose it's possible that [the rulemaking is] in the final stages, but I think it's just as likely that it isn't," the source says. "[State officials] announced quite some time ago that they were going to look at all the variables in the equation that generates the human health criteria. That is a pretty big undertaking.

The source adds: "If you look at the sheer scope of what they said they're going to do, they're nowhere close to completing it."

An Ecology spokeswoman says the state is "not slowing down" and is "on track" to propose a draft rule in early 2014. "We are moving forward with our rulemaking," the spokesman says.

The petition asks EPA to determine under section 303(c)(4)(B) of the CWA that Washington's fish consumption rate of 6.5 grams per day (g/day) -- and the resulting toxics limits -- do not fully protect human health and aquatic life, or to affirm a previous determination. Then, it asks the agency to "promulgate federal regulations applicable to Washington."

The petition notes a recent letter from EPA Region X Administrator Dennis McLerran warning state officials that the agency can implement federal standards if the state's process is "unnecessarily delayed."

"The petition is a vehicle for EPA to do that, if it [believes] that Ecology isn't going to be able to wrap this up," the source says. "If neither one of them wants to do it, it would be a vehicle for us to hold their feet to the fire."

The petition is in addition to the Earthjustice suit that argues EPA has already determined Washington's standards are inadequate, citing McLerran's June letter and several others that warn the 6.5 g/day rate doesn't fully protect groups that eat large amounts of fish.

Water Standards

Washington's water quality standards, crafted under the terms of EPA's 1992 National Toxics Rule, use the then-applicable national default fish consumption rate of 6.5 g/day. The state is reviewing its rules because of the 1987 CWA amendment that requires states to do so every three years.

"EPA has a heightened responsibility to remedy the long outstanding deficiencies in Washington's water quality toxic criteria for the protection of human health," the NWEA petition says.

EPA and states generally use fish consumption rates as one factor when setting water quality criteria, which are risk-based water quality concentrations that regulators use, along with antidegradation policy, to set enforceable standards and permit limits when waters are designated to be used for fishing purposes. EPA's current national default estimates consumption at 17.5 g/day, though it encourages states to use local data when setting intake rates.

Additionally, the petition calls on EPA to adopt revised standards to protect aquatic life, including several endangered and threatened species in the Pacific Northwest. Though Washington is currently revising its human health criteria, it is not undergoing a similar process for aquatic life standards, and EPA's warnings have focused on the human health limits.

Ecology is slated to hold a Nov. 6 public meeting "to present conceptual ideas and options for human health criteria development and implementation tools."

But the NWEA source says the "implementation tools" could hamper permit limits even if the state approves a higher fish intake rate, by granting dischargers long-term variances of the new standards.

In the June 21 letter to Washington state, EPA's McLerran said "there are sufficient regional and local fish consumption data available to revise human health criteria in both Washington and Idaho." It says there is "evidence of consumption well above 6.5 grams per day" and that "the human health criteria currently in effect for Clean Water Act purposes in Washington are not sufficiently protective."

In 2012, the agency approved criteria in Oregon that assumed consumption rates of 175 g/day, after earlier rejecting the state's criteria that used the agency's default intake rate. EPA has also disapproved Idaho's consumption rate of 17.5 g/day because the state did not consider available local information when setting the rate.

Hampering Washington's efforts on the revised criteria, the environmentalist says, is push-back from industry groups, which "have made it clear, and this is a paraphrase of their own words, 'We're not going to accept what happened in Oregon.'"

McLerran's letter drew concern from six GOP lawmakers who warned about agency "interference" in a July 26 letter to EPA Administrator Gina McCarthy.

"We believe that EPA is overstating its authority by dictating that states use overly conservative input values and risk levels in the already extremely conservative and protective formula for deriving criteria, for example, by requiring a very high Fish Consumption Rate," reads the letter, signed by the Republican House delegations for Washington and Idaho. -- *Lee Logan* (llogan@iwpnews.com)
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